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No. 540.

In the Supreme Court of the United States,

OCTOBER TERM, 1923.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Appellant*,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees*.

APPEAL FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION.

Brief of Appellant in Opposition to Motion to Dismiss Appeal.

C. M. BRACELEN,
W. V. TANNER,
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Statement.

This is an appeal from an order entered April 30, 1923, by a statutory court (convened pursuant to section 266 of the Judicial Code) denying an application of The Pacific Telephone and Telegraph Company, appellant here, for an interlocutory in-

junction to restrain the appellees from enforcing a confiscatory rate order of the Department of Public Works of the State of Washington. This denial was not on the merits, but upon the sole ground that appellant had not as yet exhausted its purported legislative remedies in the state courts of Washington.

After the denial of the interlocutory injunction, the District Judge refused to proceed in the main case. Thereupon, an application was made to the Circuit Court of Appeals for the Ninth Circuit, for a writ of mandamus commanding the District Judge to proceed. The writ was granted. (*Pacific Tel. & Tel. Co. v. Cushman, District Judge*, 292 Fed. 930.) Thereafter the District Judge on January 5, 1924, entered a decree dismissing the complaint. From this decree of dismissal an appeal was likewise taken to this court and is now pending here as cause No. 790.

On motion an order was made by this court on February 25, 1924, advancing this cause (No. 540) and the related cause (No. 790) on the calendar, and setting them down for argument together on April 14, 1924. Meanwhile the appellees on February 11, 1924, moved to dismiss the appeal in this cause, arguing that the question therein involved

had become moot. This motion to dismiss was noted for argument for March 24, 1924.

In view of this court's order advancing this cause and cause No. 790 for argument on the merits on April 14, 1924, it would seem desirable that the whole argument in these two related cases be had on the same day rather than piecemeal, and that therefore the motion to dismiss the appeal should be passed for consideration until April 14th.

Argument.

In order to determine whether appellees' motion to dismiss the appeal on the ground that the question has become moot, is well taken, the precise nature of the question involved in this appeal and the status of the litigation must be considered.

The only question before the court on this appeal from the order denying an injunction *pendente lite* is whether appellant had the right to sue in the United States court at the time it filed its complaint, or whether as a condition precedent appellant was first required to exhaust its alleged legislative remedies in the state courts of Washington.

As already stated the statutory court did not pass on the merits. Hence, on this appeal, this court will determine the jurisdictional question only, and if it holds that the statutory court was wrong in refusing to pass on the merits of the application, will remand the cause to the statutory court for that purpose.

An analogous situation was presented in *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 293, where, after determining that the statutory court erred in refusing to pass on the merits of the application for an interlocutory injunction, this court said:

"As in our opinion the District Court had jurisdiction and a duty to try the question whether preliminary injunctions should issue, and as that question has not yet been considered, the cases should be remanded to that Court, with directions to proceed to the trial. Generally it is not desirable that we should pass upon such matters until they have been dealt with below."

As, therefore, this court will not in general pass on the merits of the application for relief *pendente lite* before that question has been considered below, there is in this appeal no question of injunctive *relief* but merely a jurisdictional question.

Clearly, the argument of the appellees, that the question is moot because *no relief pendente lite* may be granted, is unsound because no relief *pendente lite* would be granted by this court in any event. Hence it cannot be said that the case is moot on the usual ground that a decree would be wholly ineffectual and inoperative. If moot at all, it must be on some other ground. But this cause can only be moot if the adjudication of the jurisdictional question has become wholly immaterial. Has it? The answer is that question depends upon whether the litigation has ceased or is still pending. If the litigation is still pending, then the question of jurisdiction in this case, as in every other case, is still a vital one; in fact, it is the *sine qua non* of the suit. Although after the present appeal from the order of the statutory court denying relief *pendente lite*, the trial judge during subsequent proceedings in the main cause below dismissed the complaint, yet an appeal from the decree was immediately taken. That a cause on appeal is still a pending cause hardly requires citation of authority.

Ex parte Craig, 274 Fed. 177, 187;
Gore v. Stacpoole, 1 Dow. (H. L.) 18, 31;
Holland v. Fox, 3 El. & Bl. 977, 985;
Howell v. Bowers, 2 Cr. M. & R. 621;;

Brasch v. Brasch, 50 Neb. 73;

Boone v. Boone, 160 Iowa 284;

Hupp v. Hocking Oil & Natural Gas Co., 88 Ohio St. 61;

Ex parte James Mumford, 57 Mo. 603, 606;

In re Egan, 24 S. D. 301;

State Board of Examiners v. Hart, 104 Minn. 88;

Pemberton v. Pemberton, 169 Ky. 476.

As the cause is still pending, the jurisdictional question must be determined. The motion to dismiss this appeal, therefore, raises only a question of practice: whether the jurisdictional question will be determined on this appeal from the order of the statutory court, or on the appeal from the decree of dismissal of the District Judge. The question not being moot and section 266 of the Judicial Code having provided for a separate appeal from an order denying the interlocutory injunction, it would seem that the question should be determined in the appeal where it is first raised.

Counsel rely upon *Shaffer v. Carter*, 252 U. S. 37, but they misconstrue the effect of that decision. In that case there were two appeals from a single decree rendered in a suit in equity heard before a

statutory court. The statutory court not only denied the application for the interlocutory injunction, but also dismissed the complaint by the same decree. Assuming that the statutory court which, under section 266, is expressly given only the power to grant or deny an interlocutory injunction, also has the power to dismiss the complaint for want of equity, still in that case there was only one decree, a final decree, in which was merged the order denying the interlocutory injunction. Obviously an appeal could not be taken from that final decree on the theory that it was interlocutory but only on the theory that the decree was final. That case is, therefore, merely authority for the proposition that where a statutory court (convened pursuant to section 266) in addition to denying the application for an interlocutory injunction dismisses the complaint in the same decree, an appeal should be taken from the final decree of dismissal under section 238 of the Judicial Code.

Here the situation is entirely different. In this case an appeal is taken, pursuant to section 266, from an order of the statutory court, denying relief *pendente lite*, and eight months later the District Judge, in whose court the main case was pending, entered a decree of dismissal from which an

appeal is taken. Here it can hardly be said that an order of the statutory court is merged in the final decree of the District Judge. There can be no merger under such circumstances. If, therefore, the question involved in the appeal from the interlocutory injunction is not moot and if the order of the statutory court is not merged in the decree of dismissal of the District Judge, then the appeal in this cause cannot be dismissed but it must be determined in due course.

In the case of *Male v. The Atchison, Topeka & Santa Fe Railroad Company*, 240 U. S. 97, a motion was made to dismiss an appeal for want of jurisdiction. The reason assigned for the motion was that the question involved on the appeal had become moot in that after the rendition of the order of the lower court declining to take jurisdiction, the appellant had sued upon the same alleged cause of action in the Supreme Court of the State of New York, where a final judgment on the merits was entered dismissing the complaint. This court refused to dismiss the appeal, assigning as its reason for its refusal that it was concerned with the jurisdictional question only, and that the motion to dismiss was based on matter going to the merits. This court, therefore, proceeded to determine the ques-

tion as to whether the lower court as a United States court had power to entertain the cause.

So in the present case the question before this court is whether the statutory court as a United States court should have entertained the cause and passed upon the question of relief *pendente lite.* This question still remains regardless of the decree of dismissal of the District Judge, from which an appeal has also been taken.

It may possibly be that if, after the decree of dismissal was entered in this cause by the District Judge, no appeal had been taken therefrom, and the time for appeal had expired, this court might not adjudicate the question whether the statutory court should have assumed jurisdiction, but such is not the case.

The case of the *City of Wallace v. Deane* (Idaho) 69 Pac. 62 is in point. In that case an appeal was taken from an order of the District Court dissolving a temporary injunction. Subsequently in the main cause below a final judgment was entered in favor of the defendant, from which final judgment no appeal was taken and the *time for appeal had expired.* Upon this ground the motion to dismiss the appeal was sustained since the controversy had com-

pletely ceased. Applying that reasoning to the present case, it follows that where an appeal has been taken from a final judgment dismissing the complaint, the controversy has not ceased and an appeal from an order denying a temporary injunction still presents a justiciable question.

Should this court, however, be of the opinion that the jurisdictional question should not be separately considered upon the present appeal, it will and must consider that question upon appeal from the final decree of the District Judge dismissing the complaint. This is true because this court must in any event determine the jurisdictional question, and secondly because if the appeal from the denial of the interlocutory injunction will not be separately considered, still upon appeal from the final decree every interlocutory order affecting the rights of the parties regarding the matters in question between them, is subject to review in the appellate court and will be decided at the same time.

Central Trust Company v. Seasongood, 130 U. S. 482;

Perkins v. Fourniquet, 6 How. 206, 209;

Forgay v. Conrad, 6 How. 201;

Texas Company v. Central Fuel Oil Co., 194 Fed. 1, 22;

Western Union Telegraph Co. v. The U. S. and Mexican Trust Company, 221 Fed. 545, 551.

While the rule of these cases ordinarily applies only where no separate appeal is provided by statute from an interlocutory order, still if in the opinion of this court the condition of this cause is now such that the appeal from the interlocutory order should no longer be separately considered, then the rule applies with full force and this court will, upon appeal from the final decree, consider the question of whether the interlocutory order was properly made.

Respectfully submitted,

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